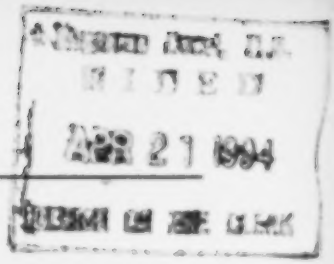
No. 93-1627



IN THE

Supreme Court of the United States

October Term, 1993

UNITED STATES LINES, INC.,

Petitioner,

-vs.-

PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, ADMINISTRATOR OF THE ESTATE OF ALFREDO VALVERDE, DECEASED,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The underlying facts of this case are set forth in the post-trial opinion of the trial judge, which is reproduced at pages 10a through 18a of the Appendix to the Petition. As is there indicated, this jury found that there was in this case both negligence and unseaworthiness and that both of these conditions contributed to the decedent's injury and death (see 12a-13a; see also 23a-24a [excerpts from special verdict]).

Prejudgment Interest

The trial court denied prejudgment interest except for the period from the date of verdict to the date of judgment (see 6a). The basis for its ruling denying interest from the date of injury and death was explained by the trial court, in a Decision and Order dated July

31, 1991 (reproduced in the Record on Appeal to the Appellate Division [at pp. 85-86] but not included in the Appendix to the Petition [compare, requiring the inclusion of such an opinion, Supreme Court Rule 14.1[k][ii]), as being required by McPhillamy v. Brown & Root, Inc., 810 F.2d 529 (5th Cir. 1987). With respect to its award of interest for the period from verdict to judgment, the trial court cited New York CPLR 5002 and Haggerty v. Moran Towing & Transportation Co., 162 A.D.2d 189, 556 N.Y.S.2d 314 (1st Dept. 1990), wherein the court had allowed such limited prejudgment interest on a Jones Act award. (6a).

The Appellate Division modified the judgment appealed from to the extent of awarding interest from the date of the decedent's injury and death, as requested by the respondent (plaintiff below) on its cross-appeal. In so ruling, the

Appellate Division followed the Second Circuit's decision in Magee v. United States Lines, 976 F.2d 821 (1992), which allowed prejudgment interest where, without "apportionment," a plaintiff had been held entitled to recover under both the Jones Act and general maritime law based on unseaworthiness (see 5a).

Based on its allowing prejudgment interest from the date of injury and death (rather than merely from the date of verdict) there was no need for the Appellate Division to consider whether Haggerty had been correctly decided, and in fact Haggerty was not mentioned in the Appellate Division's decision (4a-5a).

In its Statement of the Case, despite this being required by Rule 14.1(h) of the Rules of this Court, the petitioner has not specified the "method or manner" in which it claims it presented to the New York appellate

courts the question it here seeks to present of claimed conflict between Haggerty (allowing interest from the date of verdict to the date of judgment) and this Court's decisions laying down the general rule that prejudgment interest is not allowed on a Jones Act award (see first Question Presented and Petition at pp. 5-8). Nor has petitioner described, as again Rule 14.1(h) requires, "the way in which [this question was] passed upon by [the New York appellate courts]."

In this regard, it should also be noted that, while in its Appellate Division briefs the petitioner noted the conflict between the Fifth and Second Circuits with respect to the availability of prejudgment interest in the situation of "unapportioned" damages awards (see petitioner's main Appellate Division brief at pp.17-18 and its reply brief at pp. 5-7), in that court petitioner never

argued that Magee was incorrectly decided and should not be followed. Rather, it appeared to accept that Magee was correctly decided and its sole argument on this point was that Magee was not applicable to the instant award for pain and suffering, because, according to the petitioner, that award, unlike the award for decedent's death and the survivors' awards, was based on a jury finding that the pain and suffering damages were awarded "solely for Jones Act negligence" (see petitioner's Appellate Division reply brief at p. 6) -- ignoring the fact that in answer to Question 4 of the Special Verdict form ("Was the unseaworthy condition of the ship [the American Trader] its appurtenances or crew a proximate cause of Mr. Valverde's injuries and death?") this jury had specifically found that the ship's

unseaworthiness was a proximate cause of the decedent's injuries (23a).

On its unsuccessful motion in the New York Court of Appeals seeking leave to appeal to that court, petitioner again ignored that the correctness of Haggerty was here irrelevant if Magee had been correctly decided and was here to be followed. In addition, it again argued, altogether illogically, we submit, that "[w]hile decedent's death can be attributed in whole or in part to the Vessel's unseaworthiness, his alleged pain and suffering cannot" (see Court of Appeals Motion, p. 8). Petitioner did not argue on that motion that Magee had been incorrectly decided, and, indeed, Magee was not even cited, much less discussed, in the petitioner's Court of Appeals motion papers. Instead, petitioner's strategy in that court was to argue that the sole basis for this

pain and suffering award was Jones Act negligence and that, somehow, for a reason or reasons never explained by petitioner, there must have been reliance by the Appellate Division on Haggerty (id., pp. 8-9) -- which, again, there was not.

Foreign Currency Rates

As we understand the petitioner's second "Question Presented," petitioner seeks to present to this Court a claim that this jury should have been required to determine the value of the award for loss of the decedent's services in Brazilian currency, which foreign currency award would then be converted into United States dollars by the trial court (see Question Number 2 and Petition, pp. 8-9).

In its Appellate Division Appellant's Brief, petitioner argued that this would have resulted in awards to the

decedent's widow and children of something on the order of $888 for past services and $2,188 (prior to reduction to present value) for lost future service -- as opposed to the jury's (unreduced) awards for these elements of damages of $14,000 and $42,500 (10a).

As support for this argument, in the Petition petitioner characterizes the decedent as "a Brazilian seaman" (Petition, p. 2), and it urges that this issue in this case should have been held controlled by the Second Circuit's decision in Conte v. Flota Mercante Del Estado, 277 F.2d 664 (1960), which involved an Argentine citizen who was injured while serving aboard an Argentine owned and operated ship.

However, what petitioner ignores in making these arguments is that it is here undisputed that, while at the time of his death the decedent (when he had not been

at sea or living in New York City between ships) had been living with his wife and children in a rented home in Brazil, he was in fact a United States citizen, he was employed on a United States owned and operated ship and paid in United States currency, and he had been planning to move his wife and children to this country, where, presumably, the services he had previously performed for his wife and children in Brazil would now have been performed.

Moreover, with respect to this point as well, the petitioner has neglected to demonstrate in its Statement of the Case that it sufficiently preserved this specific issue of law with the New York courts. In this regard, we would note that all that petitioner urges with respect to its supposedly having preserved this issue consists of its statement that it had excepted to the

refusal of the trial court to charge the substance of its request # 36:

> The amount of lost services should be ascertained by determining the nature, duration, and cost if paid for of the household services which Mr. Valverde would have performed if he had survived the casualty.

(Appellate Division main brief, p. 9, and Petoition, p. 4). It does not claim to have otherwise raised the subjects of foreign currency and/or exchange rates with the trial court prior to verdict (see Petition, pp. 4-5, discussing post-trial motion based on alleged excessiveness of award for lost services), and there is no evidence that the New York appellate courts ever considered this precise argument now sought to be made by the petitioner.

REASONS FOR DENYING THE WRIT

1. NEITHER OF THE QUESTIONS SOUGHT TO BE PRESENTED FOR REVIEW WAS PROPERLY PRESERVED FOR REVIEW IN THIS COURT.

As we understand this Court's jurisdiction under 28 U.S.C. Section 1257 to review final judgments of state courts, it is essential to the Court's jurisdiction to review such judgments that the claimed federal issue sought to be presented for review was either properly presented to the trial and appellate courts of that State or, at the least, that the question sought to be presented to this Court was ruled upon by the highest State court in which review could be had. See also Supreme Court Rule 14.1(h). See generally, collecting cases, Stern, Gressman & Shapiro, Supreme Court Practice (6th ed. 1986), 3.21.

Here, as we have pointed out, there is no indication that petitioner ever properly presented to the New York

appellate courts any issue as to whether the Magee decision was correctly decided. Similarly, there is no evidence that the New York appellate courts ever felt that they were required in this case to pass on whether Haggerty had been correctly decided. Just the opposite, there is every reason to believe that the New York appellate courts considered the correctness of Haggerty an issue which need not, and accordingly should not, be reached in this case.

Likewise, there is no basis in this case for believing that either the trial court or the New York appellate courts ever felt required to or did review petitioner's "foreign currency" point.

In short, it is submitted that this Court is without jurisdiction to review the questions of law sought to be presented to it for review by this Petition.

2. THE CLAIMED CONFLICT BETWEEN THE APPELLATE DIVISION'S HAGGERTY DECISION AND DECISIONS OF THIS COURT IS NOT A SUFFICIENT REASON FOR THE GRANT OF REVIEW IN THIS CASE.

Whether or not Haggerty was correct is in fact irrelevant here, since this case was not decided by the Appellate Division based on Haggerty. Rather, that court decided the issue of prejudgment interest presented here based on Magee, which is not claimed to be in conflict with any decisions of this Court, and is not even claimed by this petitioner to have been incorrectly decided. Compare, in accord with Magee, Borges v. Our Lady of the Sea Corp., 935 F.2d 436, 443-44 (1st Cir. 1991).

Since the issue of the correctness of Haggerty is not necessarily presented by this case, it is submitted that this question does not furnish a proper basis for the grant of review in this case. See Rule 10.1(b) and (c).

3. PETITIONER'S "FOREIGN CURRENCY" POINT IS INCORRECT AND, IN ANY EVENT, DOES NOT WARRANT REVIEW.

It is submitted that, even apart from this point not being preserved for review by this Court, it does not warrant the grant of review by this Court.

To begin with, at least on the facts of this case, with the decedent having been a United States citizen employed on a United States owned and operated ship and his having been paid in U.S. currency and having intended to move his young family to this country, there can be no valid argument made that it was required that this jury be instructed that the amount to be awarded for past and future loss of the decedent's services be determined in Brazilian currency. That would only have unnecessarily injected into this already very complex damages determination another most complex and confusing factual issue.

Further, that would have ignored the fact that, had the decedent not died when he did, on this evidence the jury could have concluded that he would have shortly moved his family to this country and here provided the past and future services in issue.

Plainly, this is not at all comparable to the Conte case, and it cannot have constituted reversible error, much less plain reversible error, for the trial court not to have instructed this jury in accordance with Conte.

Furthermore, there is with respect to this issue no question of conflict with other decisional law sufficient to warrant the grant of review. Rather, this is here, most peculiarly, a highly fact-specific question of law and fact of no widespread or general importance.

4. THE PETITION SHOULD BE DENIED BASED UPON THE PETITIONER'S FAILURE TO COMPLY WIH THIS COURT'S RULES.

As noted above, in the Petition petitioner has failed to comply with at least the following Rules of this Court relating to petitions for certiorari: Rule 14.1(h), in that the Petition fails to sufficiently demonstrate how the questions sought to be presented were preserved for review in the New York appellate courts; Rule 14.1(k), in that the appendix to the Petition does not contain a copy of the trial court's July 31, 1991 Decision and Order denying prejudgment interest based on McPhillamy (see Record on Appeal to Appellate Division, pp. 85-86).

CONCLUSION

For the reasons set forth herein, this Court should deny the Petition.

Dated: April 20, 1994

Respectfully submitted,

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